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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

RICHARD MCCARTHY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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46 pp

QUESTION PRESENTED

If a plaintiff can prove that the negligent operation of a federal lake and park as a recreational facility caused his injuries, and that the negligence was unrelated to the operation of the area as a flood control project, is the bar to recovery of compensation for personal injuries stated in 33 U.S.C. § 702c inapplicable?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Richard McCarthy respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on June 28, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 850 F.2d 558, and is reprinted in the appendix hereto, p. A-1, *infra.*

The opinion of the United States District Court for the Northern District of California is reported at 654 F.Supp. 33 and is reprinted in the appendix hereto, p. A-10, *infra.*

JURISDICTION

Invoking federal jurisdiction under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and § 2671 *et seq.*, petitioner brought this suit in the Northern District of California. On November 7, 1986, the Northern District held that the United States was immune from liability under 33 U.S.C. § 702c, and that therefore the court had no jurisdiction, and the action was ordered dismissed.

On petitioner's appeal, the Ninth Circuit on June 28, 1988 entered a judgment and an opinion affirming the decision of the District Court.

On July 16, 1988, petitioner filed a Petition for Rehearing & Suggestion for Rehearing En Banc. On September 12, 1988, the Ninth Circuit issued its Order Denying Petition for Rehearing & Suggestion for Rehearing En Banc; and on September 21, 1988 the mandate of the Ninth Circuit was filed by the District Court.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The primary statute involved herein is 33 U.S.C. § 702c, the pertinent part of which is set forth below, and the entirety of which is set forth in the Appendix, p. A-18. Cited in the Statement of the Case hereafter are 33 U.S.C. § 603a, set forth in its entirety below; and 16 U.S.C. § 460d, set forth in pertinent part below, and in its entirety in the Appendix, p. A-19.

33 U.S.C. § 702c

. . . .

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: . . . .

33 U.S.C. § 603a

Removal of snags and debris, and straightening, clearing, and protecting channels in navigable waters

> The Secretary of the Army is authorized to allot not to exceed $300,000 from any appropriations made prior to or after March 2, 1945, for any one fiscal year for improvement of rivers and harbors, for removing accumulated snags and other debris, and for protecting, clearing, and straightening channels in navigable harbors and navigable streams and tributaries thereof, when in the opinion of the Chief of Engineers such work is advisable in the interest of navigation or flood control.[1]

16 U.S.C. § 460d

> The Chief of Engineers, under the supervision of the Secretary of the Army, is authorized to construct, maintain, and operate public park and recreational facilities at water resource development projects under the control of the Department of the Army. . . .

STATEMENT OF THE CASE

On April 20, 1984 petitioner Richard McCarthy sustained devastating injuries, including C-5 quadriplegia, while diving in the waters of Lewisville Lake at East Copperas Park, in Denton County, Texas. Since that date, he has been paralyzed below the neck. His complaint, invoking federal jurisdiction under the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and § 2671 *et seq.*, seeks damages against the United States for alleged negligence on the part of the United States, and its employees, in the operation of recreational facilities owned and maintained by the government.

Lewisville Lake is a reservoir in Denton County, Texas constructed by the U.S. Army Corps of Engineers "in the interest of flood control" under the River and Harbor Act, 33 U.S.C. § 603a. The underlying lands of Lewisville Lake are owned by the United States, and the State of Texas owns the waters. The Corps of Engineers constructed, developed, and maintained Lewisville Lake, and further maintained and operated seventeen parks

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[1] A 1986 amendment changing the sum of $300,000 to the sum of $1,000,000 is not relevant to the Petition herein filed.

thereon, as authorized by 16 U.S.C. § 460d, one of which is East Copperas Park. The dam at this location, which was constructed in connection with the flood control project, is likewise owned and operated by the United States. Lewisville Lake is a multi-purpose project lake that includes, among its uses, flood control and recreation.

On April 24, 1986, there were no ongoing flood control activities of any kind at Lewisville Lake or at East Copperas Park. Although defendant proffered evidence to show that it regularly monitored water levels at some unspecified location at Lewisville Lake and discharged waters therefrom as necessary, there was absolutely no evidence that any activity in furtherance of flood control took place at East Copperas Park, where plaintiff sustained injury, either on the date of plaintiff's injury or at any other time; nor was evidence presented to show that any flood control activities affected conditions at the location on Lewisville Lake where plaintiff sustained injury, either on that date or at any other time. Indeed, the United States ("defendant") conceded that it had developed East Copperas Park for recreational use, and that the park was operated by defendant pursuant to 16 U.S.C. § 460d solely as a recreational project.

At the beach of East Copperas Park, defendant had provided picnic tables, a vehicle parking area, grills, restroom facilities, and a boat launch ramp. East Copperas Park was a popular place for swimming, picnicking, and windsurfing, and at the time plaintiff was injured, there were about fifty people enjoying water-related activities. Defendant admitted that it *permitted* swimming and diving at the location where plaintiff sustained injury, in spite of defendant's further admission that it was not safe to dive or swim there. There were no signs prohibiting swimming or diving, or warning against these activities.

Richard McCarthy had gone to the lake to windsurf with some friends. Since it was too windy to windsurf, petitioner did not do so. He did run into the lake, and at a point where he was about waist-deep, dove into the water. The water was turbid, and he could not see the bottom. He struck his head either on the uneven, sandy bottom, or upon some object located thereon, and

fractured his neck; petitioner does not know what he hit. As a result of this incident, petitioner was rendered a quadriplegic.

McCarthy filed suit in the District Court for the Northern District of California on March 20, 1986, after his claim had been presented to and denied by the Department of the Army. The complaint alleged: (1) That defendant United States constructed, maintained, operated and controlled the premises upon which plaintiff was injured; (2) That defendant controlled and permitted access to the location where plaintiff was injured and encouraged such use of the beach by providing various facilities; (3) That defendant had observed, but failed to prohibit, swimming and diving at that location; (4) That the premises were dangerous and defective in several particularly described respects, and that defendant knew it; (5) That despite such knowledge, defendant encouraged the public to dive there, failed to give any warning to foreseeable users of the beach of the known dangerous conditions, failed to prohibit diving, and failed to inspect the beach or make it safe. None of these allegations of negligence related in any manner to governmental operation of Lewisville Lake as a *flood control facility*, but instead related solely to the operation of East Copperas Park and Lewisville Lake as a *recreational facility*.[2]

On September 22, 1986, defendant filed a motion to dismiss, or, alternatively, for summary judgment, on the ground, among others[3], that the United States was immune pursuant to the

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[2] In addition to these allegations, petitioner did also allege in his complaint that turbidity of the water was caused by defendant's conduct of frequently increasing and decreasing the water level of the lake by operating the dam. A claim for damages against the United States based upon such allegations would, pursuant to this Court's decision in *United States v. James*, 478 U.S. 597, 106 S.Ct. 3116 (1986), clearly be subject to dismissal, due to government immunity pursuant to 33 U.S.C. § 702c. Therefore, petitioner has abandoned any claims of negligence related to flood control activities of defendant.

[3] Because the court dismissed the action solely on the basis of 33 U.S.C. § 702c, only this ground for the motion is discussed in this petition.

immunity provision of § 3 of the Flood Control Act of 1928, 33 U.S.C. § 702c.

Citing the Supreme Court's decision in *United States v. James*, 478 U.S. 597, 106 S.Ct. 3116 (1986), and the Ninth Circuit's decision in *Morici Corp. v. United States*, 681 F.2d 645 (9th Cir. 1982), the District Court for the Northern District of California dismissed petitioner's complaint. Rejecting petitioner's argument that McCarthy's injuries were related solely to recreational operation of the facilities, and not in any manner related to flood control operation, the District Court relied upon the rule of the Ninth Circuit stated in *Morici Corp. v. United States*, 681 F.2d at 648, that the government is immune: "[E]ven if the project was being operated at the time of the negligence for a purpose other than flood control. . . ." The District Court in *McCarthy* expressly rejected the rule of the Fourth Circuit, stated in *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978), that immunity should apply only when injury results from the project's *flood control* operations, not when injury results from the project's *recreational* operations.

Petitioner timely filed a notice of appeal on December 5, 1986, subsequent to the ruling of the District Court on November 7, 1986. The Ninth Circuit issued its opinion on June 28, 1988, affirming the decision of the District Court that 33 U.S.C. § 702c barred McCarthy's action under the Federal Tort Claims Act for the personal injuries he sustained. The court therein likewise relied on *Morici*, and expressly rejected the rule of the Fourth Circuit, discussed above, stated in *Hayes*. The Ninth Circuit also relied on its interpretation of the Supreme Court's opinion in *James*, which involved injuries occurring at a federal flood control project while flood control activities were in progress.

Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc on July 16, 1988, which was denied by the Ninth Circuit on September 12, 1988.

REASONS FOR GRANTING THE WRIT

I

The decision of the Court of Appeals below conflicts with the decision of another federal Court of Appeals on the question presented, and therefore impairs the uniform administration of the Federal Tort Claims Act.

Whether a person rendered quadriplegic by the alleged negligence of the United States in the operation of a recreational facility located within a flood control project has the right to recover under the Federal Tort Claims Act (28 U.S.C. § 2671 *et seq.* ["FTCA"]) now depends upon the circuit in which the action is filed. In the Fourth Circuit, pursuant to *Hayes v. United States,* 585 F.2d 701 (4th Cir. 1978), the claimant would prevail; however, in the Ninth Circuit, pursuant to the court's decision in this case, *McCarthy v. United States,* 850 F.2d 558 (9th Cir. 1988), and the previous case of *Morici Corp. v. United States,* 681 F.2d 645 (9th Cir. 1982), the claimant's recovery would be barred by lack of jurisdiction, since that circuit holds the United States immune from liability under the Flood Control Act, 33 U.S.C. § 702c. For a claimant such as Richard McCarthy who has sustained catastrophic injury under such circumstances, the right to bring such a claim may well make the difference between an independent, self-sustaining life and an existence overridden by incapacity and despair. Matters of such importance should be determined by uniform, sound administration of the FTCA, determined after reasoned analysis of competing judicial interests. *McCarthy* presents an opportunity for such a determination by the Supreme Court.

At issue here is whether McCarthy's action falls under the immunity provision of the Flood Control Act, 33 U.S.C. § 702c, which provides in relevant part that: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place. . . ." If § 702c immunity is here applicable, McCarthy's action under the FTCA for personal injuries sustained while using the waters of Lewisville Lake is barred, and the District Court lacked subject matter jurisdiction over the action. Such was the holding of the Ninth

Circuit in the opinion issued below. Petitioner contends, however, that § 702c immunity is not applicable so long as he can prove that his injuries occurred as a result of the operation of Lewisville Lake as a recreational facility, without relation to its operation as a flood control project.

The Fourth Circuit was presented with the identical issue in the case of *Hayes v. Superior Court,* 585 F.2d 701 (4th Cir. 1978); *Hayes* resolved the issue in favor of the claimant and contrary to the government's assertion of immunity. There, the plaintiff sought damages for erosion and flooding of his farm allegedly caused by the operation of the dam's flood gates. Plaintiff alleged that the dam was a dual purpose dam, designed to operate as a flood control facility and to provide recreation for the public. Since it was not clear to the court for what purpose the flood gates were in operation at the time of the damage to plaintiff's farm, the court held that dismissal of the case had been premature and improper. The court stated, 585 F.2d at 702-703: "If the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c."

A similar issue confronted the Ninth Circuit in *Morici Corporation v. United States*, 681 F.2d 645 (9th Cir. 1982). There, plaintiff brought an action for crop damage allegedly caused by the seepage of water from the Sacramento River. Plaintiff claimed the seepage resulted from excessively high levels of water in the river due to the negligent operation of a dam and reservoir, constructed by the United States and operated by the Bureau of Reclamation.

The court thus considered the extent of § 702c immunity. Plaintiff contended that the damage was not caused by the project's use in connection with a flood control purpose, and therefore § 702c immunity did not apply. The court stated that immunity would *undoubtedly* apply if injury resulted from the operation of the federal project for flood control purposes. The court in *Morici* then proceeded to consider the issue raised by the plaintiff, 681 F.2d at 647, as follows:

> The plaintiff argues, however, for a rule that the existence of government immunity from flood damage negligently caused by the operation of a multipurpose project depends upon the particular use to which the project was being put when the negligence occurred. Plaintiff contends, in other words, that the court should trace the damage back to the source of the negligence. In plaintiff's view, if the government negligence was attributable to the operation of the project for a non-flood control purpose, then no immunity attaches.
>
> The only court that has expressly adopted that position is the Fourth Circuit. In *Hayes v. United States,* 585 F.2d 701 (4th Cir. 1978).... [T]he court held that if the plaintiff could show that the purpose of the gate opening was to release water solely for recreational, as opposed to flood control purposes, the plaintiff could prevail under the Tort Claims Act....

The *Morici* court then states its *limited* concurrence with *Hayes,* 585 F.2d at 702: "[T]here is no immunity for flooding caused by a federal project unrelated to flood control." However, the *Morici* court went on to state that the Ninth Circuit has consistently used the "wholly unrelated" standard to determine whether § 702c immunity applies. The court defined that standard, as applicable to the facts in *Morici,* as follows, 681 F.2d at 648:

> Even if the project was being operated at the time of the negligence for a purpose other than flood control, the operation that caused the damage was not "wholly unrelated" to a Congressionally authorized flood control project. It is the relationship between the flooding and a project Congressionally authorized for flood control which is the controlling factor.

In the case now before this court, *McCarthy v. United States,* 850 F.2d 558 (9th Cir. 1988), the Ninth Circuit proceeded accordingly to follow its earlier rule in *Morici,* as stated above, explicitly rejecting the rule of *Hayes v. United States.* In *McCarthy v. United States,* 850 F.2d at 562, the court stated:

> Further, we have declined previously to adopt the position apparently now urged by McCarthy, namely, the notion that the applicability of the immunity provision in cases involving multi-purpose projects depends upon the particular use to which the project was being put when the negligence occurred. See *Morici*, 681 F.2d at 647. In *Morici* we expressly rejected this argument, which relies on the Fourth Circuit case *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978), and reaffirmed the "wholly unrelated" standard for determining whether § 702c immunity applies.
>
> . . .We declined, however, to adopt the rule in *Hayes* that "[i]f the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he would avoid the absolute bar of § 702c." *Hayes*, 585 F.2d at 702-03; *Morici*, 681 F.2d at 647. Instead we stated that it is the purpose of the project authorized by Congress and not the purpose of the employee's conduct that is determinative. *Morici*, 681 F.2d at 648.

Thus, the conflict between the two circuits is clear, as is the determinative effect of the application of each competing doctrine to a claim for personal injuries, such as McCarthy's, arising from alleged government negligence in the management of recreational facilities. Fair, uniform administration of the FTCA is impossible, due to this conflict.

II

The decision below is contrary to this Court's decision in *James*, and likewise contrary to a majority of district courts which have ruled on this issue subsequent to *James*.

Relevant to the issue before the Court is the decision in *United States v. James*, 478 U.S. 597, 106 S.Ct. 3116 (1986). In that case recreational users of reservoirs located upon federal flood control projects sustained injury *while the facilities were actively involved in flood control activities*. As the Court stated, 478 U.S. at 604: "Respondents' injuries occurred as a result of the release of waters from reservoirs that had reached flood stage."

Since the injuries sustained by the tort claimants in *James* occurred while waters were being released for flood control purposes, the Supreme Court in *James* did not need to resolve the issue now before it: the applicability of immunity to negligence occurring as a result of *recreational* operation of the facility not involving flood control operation. However, this Court in *James* did make reference to this most important distinction. After noting that the injuries in *James* were caused by "flood waters" as that term is defined in § 702c, this Court placed a footnote, 478 U.S. at 605, footnote 7. That footnote states as follows:

> See *Morici Corp. v. United States,* 681 F.2d at 647-648 (no immunity for flooding if inundation " 'wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization' "), quoting *Peterson v. United States,* 367 F.2d 271 (CA9 1966); *Hayes v. United States,* 585 F.2d 701, 702-703 (CA4 1978) ("If the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility *without relation to the operation of the dam as a flood control project,* he would avoid the absolute bar of § 702c" (emphasis added)). (emphasis by the Court)
>
> We have noted that here the District Courts in each case found that the waters were being released from federal flood control facilities to prevent flooding. App. to Pet. for Cert. 61a, 68a. The Court of Appeals upheld these findings, 760 F.2d, at 603, and assumed that "the waters in this [consolidated] case were floodwaters." Id., at 594, n.6.

It is significant that *Morici Corp. v. United States,* 681 F.2d 645, is cited in this footnote in *James* for the proposition that there is no immunity for flooding if the inundation is "wholly unrelated to . . . flood control" (478 U.S. at 605, footnote 7). That is, this Court's citation of *Morici* above-indicated includes the *Morici* citation of *Peterson v. United States,* 367 F.2d 271 (9th Cir. 1966), a case in which § 702c immunity was held *inapplicable* because the alleged damage occurred as a result of activities unrelated to a Congressional flood control project. After that citation to *Morici* for the proposition that immunity does not

apply in certain cases, *James* in that same footnote then *favorably cites Hayes* for the very propositon urged herein by McCarthy.

The Supreme Court thus set forth in *James* its determination that § 702c immunity is broad and far-reaching to cases in which flood control activities are involved; however, by its inclusion of footnote 7, this Court clearly stated that there are *limits* to § 702c immunity. Those limits include: (1) cases where the flooding is wholly unrelated to any flood control project whatsoever; and (2) cases to which the standard *Hayes* applies—those in which damage occurred as a result of the facility's operation as a recreational facility without relation to its operation for flood control purposes.

However, some confusion arises from this Court's discussion thereafter in *James*, 478 U.S. at 605, where the Court notes once again that the release of waters in *James* was clearly related to flood control. The Court further states that it rejects claimant's argument that the government is not entitled to immunity because injuries arose from alleged mismanagement of recreational activities wholly unrelated to flood control. Since the government activities in *James* were so clearly related to flood control, this Court did not discuss the possible inconsistency between footnote 7, the contents of which are above-discussed, and this later dictum in the opinion.

This seeming inconsistency in *James* received extensive discussion by the District Court of New Mexico in *DeCochiti v. United States*, 647 F.Supp. 538 (D.N.M. 1986). There plaintiffs brought suit against the United States alleging that negligent design, construction, maintenance and operation of the Cochiti Dam had caused damage to the underground water table, destroying crops and rendering some land unusable. Plaintiffs alleged that the damage occurred when the water was impounded behind the dam for purposes other than flood control. The government urged immunity under 33 U.S.C. § 702c.

The *DeCochiti* court first noted that the circuits which have considered the scope of the immunity provided in § 702c are not in agreement, *DeCochiti v. United States*, 647 F.Supp. at 539. Noting the similarity of the facts before it to the facts in *Hayes*,

the court then discussed at length the competing rules of *Hayes* and *Morici*. After noting that the Tenth Circuit had not ruled on the issue, the *DeCochiti* court went on the consider the effect of the Supreme Court decision in *James* on the issue before it.

First, the *DeCochiti* court noted, 647 F.Supp. at 540, that the Supreme Court in *James:* "[D]oes not reach the narrow issues herein presented. In *James*, the plaintiffs sued the government for injuries which occurred while a dam was being operated for flood control purposes, and the Court held that § 702c barred recovery."

The *DeCochiti* court then discussed at some length the very issues addressed herein—the seeming inconsistency between footnote 7 in *United States v. James* and the Supreme Court's statements later in the opinion, stating, 647 F.Supp. at 541:

> The implication of footnote 7, given the facts of the case at bar, is that the Court would follow the *Hayes* rule and allow claims where it is alleged that flood damage occurred when a flood control project was being operated for purposes other than flood control.
>
> . . . .
>
> As *Hayes* and *Morici* are urreconcilable [sic], so too are the Court's statements in footnote 7 on page ____, 106 S.Ct page 3122 and on page ____, 106 S.Ct. pages 3122, 3124 in *James*. The Court in *James* provides both parties in the present case with some hope but provides scant guidance for this Court.

The court in *DeCochiti* thereafter reaches a decision consistent with the rule of *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978), and contrary to the rule of *Morici Corp. v. United States*, 681 F.2d 645 (9th Cir. 1982). *DeCochiti* concludes, 647 F.Supp. at 542:

> Although the Supreme Court was somewhat ambivalent in *James* about limiting immunity under § 702c their ambivalence is, by itself, reason to deny Defendants' motion. . . . The split in authority in the circuits, the lack of precedent in the 10th Circuit, and the lack of a definitive ruling by the Supreme Court illustrate that the law in this area is unclear.

It is not only the District Court of New Mexico in *DeCochiti* which has faced this issue since the Supreme Court's decision in *United States v. James,* but three other district courts as well. In *Denham v. United States,* 646 F.Supp. 1021 (W.D.Tex. 1986), aff'd, 834 F.2d 518 (5th Cir. 1987),[4] an action for damages was filed under the FTCA, in which plaintiff alleged injuries sustained at a federal flood control reservoir, which resulted in quadriplegia. Among the claims made by the government was that the application of 33 U.S.C. § 702c immunity precluded the plaintiff from recovery.

The *Denham* court, like the court in *DeCochiti,* then discussed the Supreme Court decision in *James.* The court first held that since the warning signs involved in *Denham* were unrelated to the operations of flood control, there was nothing in *James* that would bar recovery. Next turning its attention to the very issue here urged by Petitioner, the applicability of *Hayes v. United States,* 585 F.2d 701 (4th Cir. 1978), the court in *Denham* reached a decision *following* the rule of *Hayes,* stating, 646 F.Supp. at 1027:

> To summarize, the Court finds that if a Plaintiff alleges and proves an injury unconnected with the operation of a facility as a flood control project, the *James* decision will not bar suit against the United States. The cause of a plaintiff's injury should be reviewed on a case by case basis to determine the relationship of the injury to the control, retention, and/or release of flood waters. As such, the Court holds that the Flood Control Act's immunity provision does not bar Robert Denham's claim against the United States.

Thus, a second court has, post-*James,* determined the very issue now before this Court in *McCarthy,* in a holding consistent with the *Hayes* decision, and consistent with the Supreme Court's footnote 7 in *United States v. James,* 478 U.S. at 605.

A third district court has considered the identical issue since the determination of *James.* In *Clay v. United States,* 647 F.Supp. 110 (S.D.Miss. 1968), plaintiff alleged crop destruction due to

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[4] The opinion in the Fifth Circuit did not discuss the immunity issue, since that issue was not raised by the United States on appeal.

flooding by the United States in connection with government flood control activity in a national forest. The government alleged § 702c immunity. The *Clay* court stated, 647 F.Supp. at 111:

> In *United States v. James,* the Supreme Court decided that the immunity granted by 33 U.S.C. § 702c applied to personal injury as well as to property damage where the cause of the injury admittedly was a federal activity for flood control. On the other hand, the Supreme Court cited with approval, although in dicta, the case of *Hayes v. United States,* 585 F.2d 701, 702-03 (4th Cir. 1978), summarizing the holding of that case as follows:
>
> > ("If the Plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility *without relation to the operation of the dam as a flood control project,* he would avoid the absolute bar of § 702c"...).
>
> *United States v. James,* ____ U.S. at ____ n.7, 106 S.Ct. at 3122 n.7, 92 L.Ed.2d at 494 n.7 (emphasis by Supreme Court). *Thus, it appears that the immunity granted by Section 702c does not apply if the act which caused the flooding was done for a purpose other than flood control, even if the act was incidental to a flood control project.* (emphasis added.)

As noted, the court in *Clay* likewise determined that plaintiff's claim was not barred by § 702c immunity.

Perhaps contrary to these three district court decisions is the decision in *Richey v. United States,* 674 F.Supp. 780 (D.N.D. 1987). Plaintiffs' boat was damaged while being operated on a reservoir located within a flood control project. Plaintiffs initiated a claim under the FTCA, claiming that employees of the United States were negligent because they had knowledge of the obstruction which the boat had hit and should have either removed it or marked it. Although the issue is not specifically discussed by the court, it does not appear that there were ongoing flood control activities at the time of the incident. Citing this Court's opinion in *James,* the court found the government immune under § 702c, and granted the government's motion for summary judgment.

These four decisions are the only ones which have been located by counsel which have discussed, subsequent to the *James* decision, the issue here presented.[5] Three of the four district courts have determined that issue in favor of the claimant and contrary to the government's argument of § 702c immunity, adopting the identical rationale herein argued by McCarthy. At least one court, the District Court of New Mexico in *DeCochiti v. United States*, 647 F.Supp. 538 (D.C.N.M. 1986), has explicitly stated that as to this issue the Supreme Court in *James* "provides scant guidance for this Court," 647 F.Supp. at 541. The *McCarthy* case presents a clear vehicle for this Court to present needed guidance to the lower courts, resolve the clearly existing conflict between decisions of the Fourth Circuit and Ninth Circuit, and clarify the ambiguities in *James*.

III

Because the decision of the Court of Appeals below undermines the purposes of the FTCA and the purposes of § 702c immunity, as described in *James*, and is fundamentally unjust, the decision below should be reversed.

In *Feres v. United States*, 340 U.S. 115, 139, 71 S.Ct. 153 (1950), the Supreme Court held that the FTCA represents "... [T]he culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." At the same time, this Court stated in *James*, 106 S.Ct. at 3124: "... [T]he broad principle applicable here is that a "clear relinquishment of sovereign immunity [is required] to give justification for tort actions." " These doctrines clearly present countervailing considerations, which must be reconciled.

Petitioner submits that the key to a sound resolution of the issue presented in *McCarthy*, consistent with the intentions of Congress, is presented elsewhere in this Court's *James* opinion,

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[5] *Stelly v. United States*, 644 F.Supp. 107 (W.D.La. 1986) is a case finding Section 702c immunity after the Supreme Court's decision in *James*; however, in *Stelly*, flood control activities were clearly ongoing at the time damage to plaintiffs' property occurred.

wherein the Court states, 478 U.S. at 608: "Congress clearly sought to ensure beyond doubt that sovereign immunity would protect the government from "any" liability associated with flood control." The Court must therefore identify those fact situations in which the claimed governmental negligence involves "any liability associated with flood control"; in those situations, and *only* in those situations, § 702c immunity bars the plaintiff's claim. This test was in fact applied by the Court in *Denham*, which stated that the cause of a plaintiff's injury should be reviewed on a case by case basis to determine the relationship of the injury to flood control activities, 646 F.Supp. at 1027.

A hypothetical fact situation will place this issue in clearer perspective. The government, upon land contained in a federal flood control project, operates a public beach for recreational purposes, along with a snack bar adjacent thereto. Through admitted negligence of government employees, perishable foods are not properly refrigerated; a customer of the snack bar ingests spoiled food, and becomes seriously ill. The customer files a claim under the FTCA. Applying the test stated above from this Court's opinion in *James*, the customer's right to recover under the FTCA would depend upon the court's decision as to whether there was "any liability associated with flood control." In this example, the only association with flood control is the fact that the place of injury was a federal flood control project. Petitioner submits that, considering the above language from *James*, the purposes of the FTCA, and the purposes of § 702c immunity, the only legitimate determination by the court would be that this plaintiff's claim should not be barred by governmental immunity.

Likewise, assume that a government vehicle, while being negligently operated, strikes a pedestrian crossing a road located within a flood control project. The injured pedestrian sues under the FTCA. Once again, the only association with flood control is that the injury occurred upon a flood control project, and immunity should surely not apply.

Exactly the same analysis applies to the fact situation in *McCarthy*. The liability claimed herein, arising from negligence in the maintenance of public beach facilities and the protection of the public thereon, simply has no relationship to a liability

associated with flood control. Just as in the examples previously stated, McCarthy's injuries happened to occur within the confines of a flood control project. The beach could just as well have been within a national park. There is no indication that Congress intended the confines of federal flood control projects to be "immune lands"; Congress instead intended, as stated by this Court in *James*, that the government would be immunized from any liability *associated with* flood control. Thus, there is no question that the Ninth Circuit has erred in *McCarthy*, and immunity should not apply to his claim.

This analysis is consistent with the recognition that § 702c immunity serves the important but specific purpose of granting the government a broad spectrum of immunity with regard to activities related to flood control. At the same time, permitting recovery for injuries *unrelated* to flood control activities no more intrudes upon the intentions of § 702c immunity than does allowing recovery for any other wrongful conduct by the United States.

CONCLUSION

The Supreme Court has before it in *McCarthy* a case most worthy of consideration. First, there is a clear conflict between the Fourth Circuit's opinion in *Hayes v. United States*, 585 F.2d 701 (4th Cir. 1978), and the Ninth Circuit's opinions, both below and in *Morici Corp. v. United States*, 681 F.2d 645 (9th Cir. 1982)—a conflict clearly acknowledged by the Ninth Circuit in both cases.

This Court's decision in *United States v. James*, 478 U.S. 597, 106 S.Ct. 3116 (1986), dealt with a different set of facts, the applicability of immunity when flood control activities were clearly in progress at the time injury occurred. As to the fact situation presented in *McCarthy*, this Court's decision in *James*, with its favorable citation of *Hayes* contrasted with its broad statement of § 702c immunity, "[P]rovides both parties in the present case with some hope but provides scant guidance for this Court." *DeCochiti v. United States*, 647 F. Supp. 538, 541 (D.N.M. 1986). The *DeCochiti* court and two other district courts have concluded that immunity is not here applicable, while

another has seemingly decided to the contrary. All of the above considerations demonstrate the need for granting certiorari herein.

Persons suffering catastrophic injury as a result of alleged governmental negligence are surely entitled to a determination of their rights based upon *uniform* application of law, rather than having their rights determined by the fortuities of venue. Moreover, the application of the standard stated by this Court in *James* —whether there is any liability *associated with* flood control—presents this Court with a sound, reasoned test for determining *McCarthy* and the numerous other cases which will arise with similar fact situations.

On an issue of such importance to disabled and injured persons, this Court should give more than "scant guidance" (*DeCochiti v. United States*, 647 F.Supp. 538, 541). Due consideration on the merits in *McCarthy* will provide lower courts with the guidance to which they are entitled.

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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(Appendices follow)

Appendix A

Richard McCarthy,
Plaintiff-Appellant,

v.

United States of America,
Defendant-Appellee.

No. 86-2988.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 18, 1987.

Decided June 28, 1988.

TANG, Circuit Judge:

Richard McCarthy appeals the district court's dismissal of his action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b) and 2671 *et seq.* McCarthy was severely injured in a diving accident that occurred at a lake owned and operated by the United States and the Army Corps of Engineers as part of a federal flood control project. The district court concluded the United States was immune from liability under the Flood Control Act of 1928, 33 U.S.C. § 702c. We affirm.

I.

Lewisville Lake is a reservoir in Denton County, Texas constructed by the Army Corps of Engineers "in the interest . . . of flood control" under the River and Harbor Act, as amended, March 2, 1945, 33 U.S.C. § 603a (1982). Although the State of Texas owns the water of Lewisville Lake, the United States owns the underlying land. The dam, constructed in connection with the flood control project, is owned and operated by the United States. Lewisville Lake is a multi-purpose project lake that has flood control as one of its purposes. The Corps monitors its water level daily and adjusts discharge rates when necessary.

The Lake also contains seventeen discrete parks, one of which is East Copperas Park. The Army Corps of Engineers operates East Copperas Park, and nine other parks located along the perimeter of the Lake, as a recreational facility. The construction, maintenance and operation of East Copperas Park is authorized by 16 U.S.C. § 460d (1982). East Copperas Park does not have a designated swimming area. Its facilities include picnic tables, a boat ramp, and vehicle parking spaces. There is no use fee charged at the Park.

On April 20, 1984 Robert McCarthy went to East Copperas Park at Lewisville Lake to windsurf with two friends. Plaintiff dove into the water, at a point where he was about waist-deep, struck his head on the bottom of the lake and fractured his neck. As a result of his accident, McCarthy was rendered a quadriplegic.

McCarthy filed suit in federal district court, after his claim had been presented to and denied by the Department of the Army, on March 20, 1986. The complaint alleged: that the defendant constructed, maintained, operated and controlled the premises on which plaintiff was injured; that defendant controlled the permitted access to the location where plaintiff was injured and encouraged such use of the beach; that defendant had observed, but failed to prohibit, swimming and diving at that location; that the premises were dangerous and defective in several particularly described respects, and that defendant knew it; that despite such knowledge, defendant encouraged the public to dive there, failed to give any warning to foreseeable users of the beach of the known dangerous conditions, failed to prohibit diving, and failed to inspect the beach or make it safe.

The trial court, relying on *United States v. James*, 478 U.S. 597, 106 S.Ct. 3116, 92 L.Ed.2d 483 (1986), held the government was immune from liability under § 702c of the Flood Control Act of 1928. *McCarthy v. United States*, 654 F.Supp. 33 (N.D.Cal.1986). The district court also determined the goverment's alleged negligence in failing to post warning signs at East Copperas Park was not "wholly unrelated" to a federal flood control project. *Id.* at 35. McCarthy timely appeals.

II.

The district court concluded it had no jurisdiction, based on its finding that § 702c immunity applied, and dismissed the action. McCarthy contends that the district court's dismissal, pursuant to the government's motion under Fed.R.Civ.P. 12(b)(1) and 12(b)(6), should be treated as one for summary judgment under Rule 56 as matters outside the pleadings were received and considered. We disagree.

The question whether the United States has waived its sovereign immunity against suits for damages is, in the first instance, a question of subject matter jurisdiction. *See, e.g., Nevin v. United States*, 696 F.2d 1229, 1231 (9th Cir.), *cert. denied*, 464 U.S. 815, 104 S.Ct. 70, 78 L.Ed.2d 84 (1983) (whether discretionary function exemption applies under FTCA question of subject matter jurisdiction); *Wright v. United States*, 719 F.2d 1032, 1034 (9th Cir.1983) (court lacks subject matter jurisdiction if claim against United States under FTCA falls within statutory exception); *c.f., Mitchell v. Occidental Ins., Medicare*, 619 F.2d 28, 30 (9th Cir.1980) (no constitutional right to sue the United States without its consent).

Moreover, when considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction. *See, e.g., Land v. Dollar*, 330 U.S. 731, 735 n. 4, 67 S.Ct. 1009, 1011 n. 4, 91 L.Ed. 1209 (1947) ("when a question of the District Court's jurisdiction is raised . . . the court may inquire by affidavits or otherwise, into the facts as they exist."); *Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir.1983) (consideration of material outside the pleadings did not convert a Rule 12(b)(1) motion into one for summary judgment). Accordingly, we review the district court's action as a dismissal for lack of jurisdiction over the subject matter. The subject matter jurisdiction of a federal court presents a question of law, reviewable de novo. *See Peter Starr Prod. Co. v. Twin Continental Films, Inc.*, 783 F.2d 1440, 1442 (9th Cir.1986).

III.

The question presented is whether McCarthy's action falls within the immunity provision of the Flood Control Act of 1928, 33 U.S.C. § 702c (1982). Section 702c provides: "No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place." The Supreme Court recently underscored the broad scope of this provision in *United States v. James*, 478 U.S. 597, 106 S.Ct. 3116, 92 L.Ed.2d 483 (1986).

James involved accidents at flood control projects where recreational users of reservoirs were swept through water retaining structures when those structures were opened to release waters in order to control flooding. *James*, 106 S.Ct. at 3118. The Court held section 702c immunized the United States from damages for property damage, personal injury and death caused by "all waters contained in or carried through a federal flood control project for purposes of or related to flood control, as well as to waters that such projects cannot control." *James*, 106 S.Ct. at 3121. The immunizing provision applied despite the government's negligent failure to warn of the dangers associated with the operation of the flood control project. *James*, 106 S.Ct. at 3124. The court's discussion emphasized that § 702c of the Flood Control Act "outlines immunity in sweeping terms" and noted "[i]t is difficult to imagine broader language." 106 S.Ct. at 3121.

Given the definition of "floodwaters" and "damage" articulated in *James*, as well as the standards we have set out in pre-*James* cases for determining the scope of § 702c immunity, we conclude the immunity provision applies in this case. First, *James* made clear the term "floodwater" is to apply to "all waters contained in . . . a federal flood control project for purposes of or related to flood control . . ." 106 S.Ct. at 3121. This definition of floodwater suggests that the term includes both "waters that are out of control" and "water at a flood control project." *See, James v. United States*, 760 F.2d 590, 594, n. 6 (5th Cir.1985) (en banc) (noting ambiguity in term floodwater), *rev'd*, 478 U.S. 597, 106 S.Ct. 3116, 92 L.Ed.2d 483 (1986). Thus, insofar as the waters of Lewisville Lake are clearly "contained in" a federal flood control project and further, where the water level of the Lake is moni-

tored on a daily basis and discharged when necessary, the waters herein satisfy the *James* definition of "floodwater," and accordingly, fall within the meaning of the statute.[1]

Second, we find there is a sufficient nexus between the injury sustained by McCarthy and the operation of a Congressionally authorized federal flood control project. We have stated that "if injury resulted from the operation of [a] federal project for flood control purposes, government immunity is complete." *Morici Corp. v. United States*, 681 F.2d 645, 647 (9th Cir.1982). McCarthy contends his case falls outside this general rule and is distinct from *James*, because his injuries did not result from any tangible flood control activity or operation. This argument, which seeks to distinguish between the active operation of a flood control facility and its passive or more static condition, cannot, in light of *James*, be maintained.

We have previously indicated that § 702c immunity applies where the operation of flood control facilities allegedly resulted in crop damage due to seepage of water, *Morici*, 681 F.2d at 646, damage to land due to the impoundment of flood waters, *Pierce v. United States*, 650 F.2d 202, 203 (9th Cir.1981), and flood damage due to the collapse of the Teton Dam, *Aetna Ins. Co. v. United States*, 628 F.2d 1201, 1202 (9th Cir.1980), *cert. denied*, 450 U.S. 1025, 101 S.Ct. 1732, 68 L.Ed.2d 220 (1981). The instant case, though lacking a more obvious connection to a flooding or floodwater disaster such as that present in the *Aetna* case, is perhaps more analogous to the seepage described in *Morici*. Although McCarthy's injury did not result from a perceptibly active operation of the flood control facility, the record does indicate ongoing monitoring and discharge of water levels at the Lake, activities which even formed part of appellant's complaint for negligence. *See* Complaint, ¶¶ 12(c), 13(a).

Given the difficulty of distinguishing between the active and passive operations of federal flood control facilities, particularly

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[1] It is also evident that the personal injuries sustained by McCarthy fall within the term "damage" of § 702c. *James* expressly found that the word "damage" included both injury to property and injury to the person. *James*, 106 S.Ct. at 3121.

since a passive condition is invariably the result of other active forces which have gone before, we decline to adopt the distinction urged by McCarthy. By including Lewisville Lake as part of a larger federal flood control facility, the United States created a "condition" which under a variety of circumstances could result in harm to person and property. As the Supreme Court underscored in *James*, the "sweeping language" and legislative history of § 702c indicate a Congressional intent "to ensure beyond doubt that sovereign immunity would protect the government from 'any' liability associated with flood control." *James*, 106 S.Ct. at 3123. Accordingly, because waters contained in a federal flood control project for purposes related to flood control were a substantial factor in bringing about McCarthy's injuries, the immunity provision applies.

Nor is this conclusion altered by the multi-purpose nature of the flood control facility at Lewisville Lake. It is clear the immunity provision of § 702c can apply even though a federal project has multiple purposes and is not intended exclusively for flood control. *Morici*, 681 F.2d at 647; *Aetna*, 628 F.2d at 1203. *James* itself involved injury to recreational users of a reservoir that also had federal flood control use. Further, we have declined previously to adopt the position apparently now urged by McCarthy, namely, the notion that the applicability of the immunity provision in cases involving multi-purpose projects depends upon the particular use to which the project was being put when the negligence occurred. *See Morici*, 681 F.2d at 647. In *Morici* we expressly rejected this argument, which relies on the Fourth Circuit case *Hayes v. United States*, 585 F.2d 701 (4th Cir.1978), and reaffirmed the "wholly unrelated" standard for determining whether § 702c immunity applies.

In *Morici* we approved that portion of the discussion in *Hayes* which stated "[t]here is no immunity for flooding caused by a federal project unrelated to flood control." *See Morici*, 681 F.2d at 647; *Hayes*, 585 F.2d at 702 (citing *Graci v. United States*, 456 F.2d 20 (5th Cir.1971)). We declined, however, to adopt the rule in *Hayes* that "[i]f the plaintiff could prove damage to his farm as a result of the dam's operation as a recreational facility without relation to the operation of the dam as a flood control project, he

would avoid the absolute bar of § 702c." *Hayes*, 585 F.2d at 702-03; *Morici*, 681 F.2d at 647. Instead we stated that it is the purpose of the project authorized by Congress and not the purpose of the employee's conduct that is determinative. *Morici*, 681 F.2d at 648.[2]

Thus, in this circuit, the immunity provision of § 702c does not apply when the damage or injury is "wholly unrelated to any Act of Congress authorizing expenditures of federal funds for flood control, or any act undertaken pursuant to any such authorization." *Morici*, 681 F.2d at 647 (quoting *Peterson v. United States*, 367 F.2d 271, 275 (9th Cir.1966)). So long as a project is authorized by Congress for flood control purposes, and the damage or injury is related to the use of that project, immunity continues to attach. *See Morici*, 681 F.2d at 648. Two cases, where immunity was denied, illustrate the application of this standard. In *Peterson* we considered flooding caused by engineers at Ladd Air Force Base in Alaska who dynamited an ice jam without warning and caused a damaging discharge of water and ice downstream. In that case, we denied the government immu-

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[2] This distinction between the *Morici* and *Hayes* standards for determining the scope of § 702c immunity explains why appellant's reliance on *Denham v. United States*, 646 F.Supp. 1021 (W.D.Texas 1986), *aff'd*, 834 F.2d 518 (5th Cir.1987) and *Respess v. United States*, 586 F.Supp. 861, 865 (E.D.La.1984) is misplaced. The district court in *Denham*, a post-*James* case, squarely applied the *Hayes* test and concluded § 702c did not bar suit against the United States because the plaintiff alleged an injury "unconnected with the operation of the facility as a flood control project." *Denham*, 646 F.Supp. at 1026. (The United States did not appeal this portion of the lower court's ruling.) In *Respess*, a pre-*James* case, the court, citing no authority, concluded that claims arising from damage and injury to passengers in a pleasure boat allegedly caused by a failure to clear a waterway of navigational hazards, were not barred by § 702c because not caused by "flood waters." *Respess*, 586 F.Supp. at 865. Although the *Respess* analysis is somewhat suspect in light of *James*, this court in any event, is bound by the "wholly unrelated" standard articulated in *Morici*.

In *James*, the Supreme Court cited both *Hayes* and *Morici*, emphasizing the "without relation" language of *Hayes* and the "wholly unrelated" standard of *Morici*. *See James*, 106 S.Ct. at 3122, n. 7.

nity, finding the flooding was "wholly unrelated" to any Act of Congress authorizing expenditures of funds for flood control. *Peterson*, 367 F.2d at 275. In a similar vein, the Fifth Circuit denied immunity for flood damage allegedly caused by negligent design and construction of the Mississippi River Gulf Channel Outlet, a navigation project and not a federal flood control project. *See Graci*, 456 F.2d 20, 26 (5th Cir.1971).

Here, however, the necessary connection to a Congressionally authorized federal flood control project is present. Lewisville Lake is a reservoir that forms part of a larger flood control project, authorized by Congress under the River and Harbor Act, 33 U.S.C. § 603a, for the purpose of flood control. Under *Morici*, "[e]ven if the project was being operated at the time of the negligence for a purpose other than flood control," so long as the damage or injury was not "wholly unrelated" to a Congressionally authorized flood control project, a sufficient nexus for purposes of § 702c immunity exists. *Morici*, 681 F.2d at 648. Thus, given the broadened definition of floodwater in *James*, the analysis of multi-purpose projects in *Morici* and *Aetna*, and the longstanding "wholly unrelated" standard of this circuit, we reluctantly conclude the immunity provision of § 702c bars McCarthy's suit for damages against the United States.

Finally, we consider McCarthy's claims regarding the government's alleged failure to post warning signs or other notices to recreational users of East Copperas Park and Lewisville Lake. In *James* the Supreme Court indicated "that the manner in which to convey warnings, including the negligent failure to do so, is part of the 'management' of a flood control project." *James*, 106 S.Ct. at 3124. In this case, the beach at East Copperas Park had not been designated a swimming area. The reasoning in *James* indicates that the government's allegedly negligent failure to warn of dangers associated with the use of Lewisville Lake as a flood control facility is considered part of the "management" of a flood control project. Accordingly, insofar as McCarthy alleges negligence in the failure to warn of dangers associated with Lewisville Lake, his claim is barred under § 702c because such negligence is not "wholly unrelated" to the management of a federal flood control project. McCarthy's injuries clearly occurred in flood

control project waters, and so, under *James*, his claim of negligence regarding the failure to warn is not actionable.

IV.

Section 702c of the Flood Control Act of 1928, as construed by the Supreme Court in *James*, bars McCarthy's action under the FTCA for the personal injuries he sustained while using the waters of Lewisville Lake, a federal flood control reservoir, for recreational purposes. The district court lacked subject matter jurisdiction over the action, and accordingly, properly dismissed.

AFFIRMED.

Appendix B

Richard McCarthy,
Plaintiff,

v.

United States of America,
Defendant.

No. C-86-1399 MHP.

Unites States District Court,
N.D. California.

Nov. 7, 1986.

MEMORANDUM AND ORDER

PATEL, District Judge.

This action arises out of injuries sustained by plaintiff in a diving accident which occurred at East Copperas Park on Lewisville Lake in Texas. The lake and park are maintained by the U.S. Corps of Engineers as part of a flood control project. The matter is currently before the court on defendant United States' motion for dismissal or summary judgment and for a change of venue. The defendant argues that the court should dismiss the claim because the United States has immunity under the Flood Control Act, 33 U.S.C. § 701 *et seq.* The Unites States contends that its alleged negligence concerns a discretionary function and therefore falls under 28 U.S.C. § 2680(a), an exception to the waiver of sovereign immunity provided in the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* ("FTCA"). If the matter is not dismissed, defendant requests a change of venue to the Eastern District of Texas pursuant to 28 U.S.C. § 1404(a) for the convenience of the parties and witnesses. Defendant also moves for summary judgment pursuant to Fed.R.Civ.P. 56(b) on the grounds that under Texas law the United States is not liable for injuries incurred by persons using its property for recreational purposes.

The court has carefully considered the papers submitted and the oral argument of counsel. For the reasons stated below, defendant's motion to dismiss is granted.

Background

Plaintiff Richard McCarthy brought this action for injuries sustained in a diving accident at East Copperas Park on Lewisville Lake in Texas. Although the State of Texas owns the water of Lewisville Lake, the United States owns the underlying land. The dam, constructed in conjunction with a flood control project, is owned and operated by the United States. The Army Corps of Engineers operates several recreational facilities on Lewisville Lake, including East Copperas Park. East Copperas Park does not have a designated swimming area. Majors Aff. at 3. Its facilities include picnic tables, a boat ramp, and vehicle parking spaces. Defendant's Memorandum in Support at 3. There is no use fee charged at East Copperas Park. Defendant's Memorandum in Support at 1.

On April 20, 1984, the plaintiff went to the lake to windsurf with some friends. Finding conditions too windy to windsurf, plaintiff paddled around on the surfboard for some time. He then ran into the lake and dove at a point when he was waist deep in water. Decl. of Counsel, Interview of Claimant at 2. Plaintiff struck his head on the bottom of the lake and fractured his neck. Decl. of Counsel, Interview of Claimant at 3. He was rendered a C-5 quadriplegic.

On March 20, 1986, plaintiff filed this action for damages against the United States pursuant to 28 U.S.C. § 1346(b) and the Federal Tort Claims Act. Defendant United States now moves to dismiss or for summary judgment, and for a change of venue.

Analysis

The threshold issue is whether this action falls under the immunity provision of the Flood Control Act, 33 U.S.C. § 702(c). Section 702c provides that "[n]o liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place . . . " This provision was interpreted very broadly by the Supreme Court in *United States v. James*, —— U.S. ——, 106 S.Ct. 3116, 92 L.Ed.2d 483 (1986).

In *James*, the Court heard two cases concerning accidents which occurred when recreational users were carried through retaining gates after water was released to control flooding. The plaintiffs alleged that the United States was negligent in its failure to adequately warn them of the danger caused by the current. *Id.*, 106 S.Ct. at 3119. The Court rejected the various arguments offered by plaintiffs as to why the United States was not immune under § 702c, finding that "Congress clearly sought to ensure beyond a doubt that sovereign immunity would protect the government from 'any' liability associated with flood control." *Id.* at 3123. The Court approved the holding of an earlier Eighth Circuit case that § 702c " 'safe-guarded the United States against liability of any kind for damage from or by floods or flood waters in the broadest and most emphatic language.' " *Id.* (quoting *National Manufacturing Co. v. United States*, 210 F.2d 263, 270 (8th Cir.), *cert. denied*, 347 U.S. 967, 74 S.Ct. 778, 98 L.Ed. 1108 (1954)).

The Court found that legislative history supports this liberal interpretation of § 702c. It interpreted "damage" to include damage to both property and persons. It further found that "the terms 'flood' and 'floodwaters' apply to *all waters contained* or carried through a federal flood control project for purposes of or related to flood control. . . . " *Id.*, 106 S.Ct. at 3121 (emphasis added). The term "floodwaters" clearly includes the water contained in Lewisville Lake.

Plaintiff argues that *James* is inapplicable to the current case because in *James* the accident occurred when water was being released to control flooding, while in this case the accident involved no flood control activity.[1] However, the Supreme Court rejected a similar argument in *James*. There the plaintiffs argued that the federal government was not entitled to immunity because the injuries arose from the mismanagement of recreational activities unrelated to flood control. The Court found "that the manner in which to convey warnings including the negligent failure to do

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[1] The complaint does allege, however, that the defendant's negligence includes increasing and decreasing the water level of Lewisville Lake by operating the dam. Complaint, ¶¶ 12(c), 13(a).

so, is part of the 'management' of a flood control project." *Id.* at 3125. Here all of the conduct complained of is within the scope of defendant's management of a flood control project.

The Supreme Court's broad reading of § 702c in *James* supports the Ninth Circuit's interpretation of the statute. The Ninth Circuit has held that the determination of § 702c immunity is governed by the "wholly unrelated" standard. "The determinative factor is . . . the purpose of the project authorized by Congress." *Morici Corp. v. United States,* 681 F.2d 645 (9th Cir.1982). In *Morici,* landowners brought an action under the Federal Tort Claims Act for damages to crops allegedly caused by water seeping from a dam and reservoir. The plaintiffs argued that the United States was not immune if the government's negligence was related to the use of the project for purposes other than flood control. The Ninth Circuit held that "[e]ven if the project was being operated at the time of the negligence for a purpose other than flood control, the operation that caused the damage was not 'wholly unrelated' to a Congressionally authorized flood control project." *Id.* at 648. "[I]mmunity under 702c should be determined by the overall purposes intended by Congress for the project, not the particular intent of a government employee at a specific time." *Id.* at 648.

In this case the lake waters were part of a federal project for flood control purposes; the level of water and the configuration of the underlying land were related to flood control. Thus, under the standard used in *Morici,* § 702c immunity applies. *Morici* was cited with approval by the Supreme Court in *James.* 106 S.Ct. at 3120-21 n. 4.

The emphasis placed on the nexus between the government's negligence, unrelated to flood control purposes, and a congressionally authorized flood control project in the determination of § 702c immunity is exemplified in *Peterson v. United States,* 367 F.2d 271 (9th Cir.1966). In *Peterson,* an action was brought under the FTCA for damages and injury resulting from flooding caused when the Army Corps of Engineers dynamited an ice jam which had formed naturally in the river. The Ninth Circuit reversed a district court's ruling that § 702c immunity applied, finding "[t]he decision to dynamite the ice jam was

wholly unrelated to any act of Congress authorizing expenditures of federal funds for flood control or any act undertaken pursuant to any such authorization." *Id.* at 275.

Plaintiff cites *Hayes v. United States,* 585 F.2d 701 (4th Cir.1978), in support of his argument that § 702c immunity should apply only where injury is caused as a result of the government's flood control activity. This interpretation of § 702c was rejected by the Ninth Circuit in *Morici,* 681 F.2d at 648. Plaintiff also cites *Martinez v. United States,* No. TY-81-134-CA, slip op. (E.D.Tex.1984), *aff'd as modified on other grounds,* 780 F.2d 525 (5th Cir.1986). In *Martinez,* the plaintiff was injured while diving into a swimming area in a reservoir operated by the Army Corps of Engineers. There is no indication in *Martinez* that the court considered § 702c immunity, or that the reservoir was part of a congressionally authorized flood control project.

In the instant case it is undisputed that the plaintiff was injured while diving into Lewisville Lake, which was constructed as part of a congressionally authorized flood control project. The plaintiff's injuries therefore were clearly caused by "floodwaters" within the definition of § 702c. The government's alleged negligence in failing to post warning signs at East Copperas Park is not "wholly unrelated" to a federal flood control project.

Accordingly, the court finds that the United States is immune from liability under § 702c. The court therefore has no jurisdiction, and the action is dismissed. It is thus unnecessary for the court to reach defendant's motion for summary judgment and to transfer venue.

IT IS SO ORDERED.

Appendix C

Not for Publication

United States Court of Appeals
For the Ninth Circuit

No. 86-2988
D.C. No. C-86-1399-MHP

Richard McCarthy,
Plaintiff-Appellant,

vs.

United States of America
Defendant, Appellee.

Order Denying Petition for Rehearing and
Suggestion for Rehearing En Banc

[Filed September 12, 1988]

Before: Tang, Canby and Brunetti, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix D

Office of the Clerk
United States District Court
Northern District of California

September 28, 1988

Case Number: C86-1399 MHP

Case Title: Richard McCarthy v. USA

Date Mandate Filed: 9/21/88

To Counsel of Record

The mandate of the United States Court of Appeals for the Ninth Circuit has been filed in the above captioned case.

Yours very truly,

William L. Whittaker, Clerk

/s/ HELEN L. ALMACEN
Case Systems Administrator

Distribution: Civil—Counsel of Record
Criminal—Counsel of Record
U.S. Marshal (Copy of Mandate)
U.S. Probation Office

United States Court of Appeals
For the Ninth Circuit

CA No. 86-2988

DC No. CV-86-1399-MHP

Richard McCarthy,
Plaintiff-Appellant,

vs.

United States of America,
Defendant-Appellee.

JUDGMENT

[Filed Sept. 21, 1988]

APPEAL from the United States District Court for the Northern District of California (San Francisco).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District for the Northern District of California, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 28, 1988.

Appendix E

§ 702c. Same; expenditures for construction work; conditions precedent; liability for damage from flood waters; condemnation proceedings; floodage rights

Except when authorized by the Secretary of the Army upon the recommendation of the Chief of Engineers, no money appropriated under authority of sections 702a, 702b to 702d, 702e to 702g, 702h to 702j, 702k, 702*l*, and 702m of this title shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to the Secretary of the Army that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 702d of this title; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however*, That if in carrying out the purposes of sections 702a, 702b to 702d, 702e to 702g, 702h to 702j, 702k, 702*l*, and 702m of this title it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of the Army and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

§ 460d. Construction and operation of public parks and recreational facilities in water resource development projects; lease of lands; preference for use; penalty; application of section 3401 of Title 18; citations and arrests with and without process; limitations; disposition of receipts

The Chief of Engineers, under the supervision of the Secretary of the Army, is authorized to construct, maintain, and operate public park and recreational facilities at water resource development projects under the control of the Department of the Army, to permit the construction of such facilities by local interests (particularly those to be operated and maintained by such interests), and to permit the maintenance and operation of such facilities by local interests. The Secretary of the Army is also authorized to grant leases of lands, including structures or facilities thereon, at water resource development projects for such periods, and upon such terms and for such purposes as he may deem reasonable in the public interest: *Provided,* That leases to non-profit organizations for park or recreational purposes may be granted at reduced or nominal considerations in recognition of the public service to be rendered in utilizing the leased premises: *Provided further,* That preference shall be given to Federal, State, or local governmental agencies, and licenses or leases where appropriate, may be granted without monetary considerations, to such agencies for the use of all or any portion of a project area for any public purpose, when the Secretary of the Army determines such action to be in the public interest, and for such periods of time and upon such conditions as he may find advisable: *And provided further,* That in any such lease or license to a Federal, State, or local governmental agency which involves lands to be utilized for the development and conservation of fish and wildlife, forests, and other natural resources, the licensee or lessee may be authorized to cut timber and harvest crops as may be necessary to further such beneficial uses and to collect and utilize the proceeds of any sales of timber and crops in the development, conservation, maintenance, and utilization of such lands. Any balance of proceeds not so utilized shall be paid to the United States at such time or times as the Secretary of the Army may determine appropriate. The water areas of all such projects shall be open to public use generally for boating, swimming, bathing, fishing, and

other recreational purposes, and ready access to and exit from such areas along the shores of such projects shall be maintained for general public use, when such use is determined by the Secretary of the Army not to be contrary to the public interest, all under such rules and regulations as the Secretary of the Army may deem necessary including but not limited to prohibitions of dumping and unauthorized disposal in any manner of refuse, garbage, rubbish, trash, debris, or litter of any kind at such water resource development projects, either into the waters of such projects or onto any land federally owned and administered by the Chief of Engineers. Any violation of such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any persons charged with the violation of such rules and regulations may be tried and sentenced in accordance with the provisions of section 3401 of Title 18. All persons designated by the Chief of Engineers for that purpose shall have the authority to issue a citation for violation of the regulations adopted by the Secretary of the Army, requiring the appearance of any person charged with violation to appear before the United States magistrate, within whose jurisdiction the water resource development project is located, for trial; and upon sworn information of any competent person any United States magistrate in the proper jurisdiction shall issue process for the arrest of any person charged with the violation of said regulation; but nothing herein contained shall be construed as preventing the arrest by any officer of the United States, without process, of any person taken in the act of violating said regulations. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received by the United States or leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.